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DEVELOPMENT OF COPYRIGHT PROTECTION IN KOREA: ITS HISTORY, INHERENT LIMITS, AND SUGGESTED SOLUTIONS

I. INTRODUCTION

Korea, the world's eleventh largest economy, is the U.S.'s sixth largest market for international trade.¹ With the advent of a globalizing economy, the two countries have sometimes experienced hostile trade relationships. Most recently, such a conflict has surfaced in the area of copyright protection. With the American influence, the World Trade Organization ("WTO") Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs" or "TRIPs Agreement")² has been and continues to be the major source of impact on intellectual property system in Korea. In particular, because Article 4 of the TRIPs Agreement adopts the most-favored nation ("MFN") principle,³ the interplay between TRIPs and MFN continues to have a significant impact on copyright protection in Korea.

Despite the direct and indirect influence the U.S. had on the development of copyright protection in Korea, cultural and legal differences between Korea and the U.S. have limited such influ-

1. See *Remarks by Ambassador Thomas C. Hubbard at the Korean Chamber of Commerce and Industry*, United States Embassy, Seoul, Korea (Oct. 26, 2001), available at <http://usembassy.state.gov/seoul/www/h010w.html>. See also *Trade and Economy: Data and Analysis*, Int'l Trade Adm., U.S. Dep't of Commerce, available at <http://www.ita.gov/td/industry/otea/usfth/aggregate/h01t58.html>.

2. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments — Results of the Uruguay Round vol. 31 (1994), 33 I.L.M. 81 (1994) [hereinafter TRIPs Agreement]. For congressional approval of the TRIPs and WTO Agreements, see Uruguay Round Agreements Act, Pub. L. No. 103-465, §§ 101–103, 108 Stat. 4809, 4814–19 (1994) (codified in scattered sections of 15, 17, 19, and 35 U.S.C.).

3. MN principle requires that the same treatment be given to all foreign producers of like products that is given to producers from the MN countries. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, art. II, Legal Instruments — Results of the Uruguay Round vol. 1 (1994), 33 I.L.M. 1125 (1995); General Agreement on Trade in Services, Dec. 15, 1993, art. IV, 33 I.L.M. 44; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 1197.

ence. As Korea is ready to open its legal market to foreign law firms in 2005⁴ and the volume of international trade in intellectual property products and human capitals ever abound, development of Copyright law in Korea is of substantial importance for American legal practitioners and academics. To identify the barriers to intellectual property protection in Korea, it is essential to gain a clear understanding of how cultural, legal and historical variables determine the progress and limits of copyright protection in Korea. Accordingly, this Note examines these three factors in relation to the development of copyright protection in Korea. Part II examines the development of copyright law in Korea in a historical perspective and suggests that its cultural and legal systems have been the major determinants of the development of copyright protection in Korea. Part III examines how the external influences such as U.S. law and executive actions permitted under Section 301 of the Trade Act of 1974 and international copyright conventions have impacted the development of Korean Copyright law. Part IV explores the limits in enforcement of copyright protection in Korea and suggests potential solutions to these problems. The Note concludes that, while external international pressures have been effective in the development of the copyright protection system in Korea, because of Korea's deeply laden socio-cultural value system that has not fully immersed into the Korea psyche, the concept of "right-based" notion of copyright, educating the Korean public about the importance of copyright protection, with the help of the international community, would provide the ultimate solution to the problems of Korean copyright protection identified in this Note.

4. "Korea must open its legal market by the end of the next World Trade Organization round in 2005." *UK Lawyers Lobby Korea to Open Legal Market*, N.Y. LAW., Feb. 20, 2002, at <http://www.nylawyer.com/new/02/02/022002a.html>. See also Legal Market: South Korea, Legal 500.com, at <http://www.legal500.com/as500/edit/sk3.htm>.

II. HISTORICAL OVERVIEW OF COPYRIGHT LAW DEVELOPMENT IN KOREA

A. *Evolution of Intellectual Property in Korean*

Despite its long history,⁵ Korea's current system of democratic government, capitalist economy and popular culture only came about less than a half-century ago.⁶ Although Korea has taken a near quantum leap in modernization process,⁷ its old values still underlie virtually all aspects of Korean society. Accordingly, to understand barriers limiting protection of intellectual property in Korea, it is first necessary to examine how the cultural and intellectual tradition of Korea has influenced the evolution of its copyright protection practice.

The inherent cultural limit that imposes a significant barrier to effective enforcement of copyright legislation in Korea can be traced back to its social structure during the Yi Dynasty.⁸ For centuries, even the concept of copyright was nonexistent in Korea because publication and distribution of print material was strictly controlled by the government. Even at times of liberalization of publication, publication was monopolized by noble class.⁹ While Korea surpassed Japan and even China in certain areas of technological development from the 13th through 16th centuries,¹⁰ its rigid social hierarchy system during these peri-

5. Korea's history dates back to approximately 2500 B.C. See History of Korea, at <http://ist-socrates.Berkeley.edu/~korea/history.htm>.

6. Korea was under monarchy until 1910 when Japan annexed Korea. Japanese annexation of Korea lasted until 1945 when Japan was defeated in the World War II. In 1948, Republic of Korea was founded. For the first time in its history, Korea took a modern form of democratic government with the political support from Washington, D.C.

7. Shortly after Republic of Korea was born, the Korean War broke out in 1950, splitting the country into the Democratic South and Communist North. From 1960's through 1980's, South Korea's economy made extraordinary progress, which in turn drastically changed the cultural and social landscape of the country.

8. Yi Dynasty lasted from 1396–1907.

9. See SEUNG-HUN HAHN, CHOJAKKWON UI POPJE WA SILMU [Copyright Law and Practice] 25 (1988).

10. The movable type of the printing press was invented in Korea in the early 13th century, more than a century before the Gutenberg print. However, print was not used by the general public until the late 19th century. The printing press was used to publish official documents for dissemination among a select few in the government. See Sang-Hyun Song and Seong-Ki Kim, *The*

ods significantly impeded dissemination of information. For example, the government during the Yi Dynasty era from the late 14th century to the early 20th century controlled book printing and publishing as a special privilege limited to those authorized by the state.¹¹ As a consequence, few Koreans had an opportunity to appreciate copyright in its practical sense.¹²

Furthermore, until recently, socio-cultural influence of the Confucian value system,¹³ which tends to devalue the materialistic compensation of the literati, significantly undermined development of copyright protection in Korea. A Korean legal commentator argued:

Those engaged in scholarly and artistic professions avoided the monetary disputes over their published works because they traditionally valued the spirit of nobility until recent years as members of the cultural elite in our country. As a result, the right-consciousness with respect to copyright did not pervade the general public in Korean society.¹⁴

B. Development of Korean Copyright Act

1. Yi Dynasty: 1396 - 1907

In 1884, copyright was first mentioned as “chulpankwon” (literally, “publishing right”) in *Hansung Sunbo*, a newspaper published by the government of the Yi Dynasty.¹⁵ “This right is designed to authorize the government to prevent others from

Impact of Multilateral Trade Negotiations on Intellectual Property Law in Korea, 13 UCLA PAC. BASIN L.J. 118, 120, n. 10 (1994).

11. See HAHN, *supra* note 9, at 25.

12. The governmental licensing of the printing press in premodern Korea is similar to the politically motivated tactic employed by the Crown in England during the 14th and 15th centuries. See PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY* 38, 40 (1994).

13. Confucian value system which emphasizes social harmony based on hierarchy has had significant influence on all aspects of Korean society including its legal system and social values. See Hyu-Chong Park, *Confucianism and Korean Communitarianism*, Seoul National University, at <http://aped.snu.ac.kr/cyberedu/cyberedu/cyberedui/eng/eng24-01.htm>.

14. YONG-SIK SONG, *PROBLEMS WITH THE CURRENT COPYRIGHT LAW* (I), 19 PYONHOSA [Lawyer] 181, 182 (1989). See also HAHN, *supra* note 9, at 25 (stating that the “traditional Confucian spirit of the nobility in Korea led Koreans to hesitate in accepting payment for their published works”).

15. JEON YOUNG-PYO, *CHONGBO SAHOE WA CHOJAKWON* [Information Society and Copyright] 105 (1993) (citing *HANSUNG SUNBO*, Feb. 1, 1884, at 18).

copying the books written and the foreign books translated by intelligent and talented people,” read the Hansung Sunbo news article.¹⁶ “By allowing only the authors the right to print and sell their books, it enables them to profit from their books and translations and at the same time to make efforts to enlighten their society.”¹⁷

2. Japanese Occupation Period: 1908-1945

Koreans' exposure to the concept of copyright was followed by a legal recognition of copyright through a treaty between the United States (“U.S.”) and Japan in 1908.¹⁸ The U.S. and Japanese treaty on Protection of Industrial Property in Korea provided that the Japanese statutes on copyright and other related rights be applied in Korea.¹⁹ As a result, the Treaty guaranteed the equal protection of copyright to Americans as to Koreans and Japanese, and the Copyright Act of Japan was “borrowed” by the royal government of the Yi Dynasty in accordance with Imperial Ordinance No. 200 on copyright.²⁰ After the Japanese annexation of Korea in 1910, it is not clear how and to what extent the Japanese colonial government enforced its copyright law in Korea. However, it is most likely that copyright was not a major concern to the Japanese colonial rulers because Korea was not culturally ready to recognize copyright as a right. This is hardly a surprise considering that copyright did not directly affect the predominant “peace and order” goal of the Japanese colonial government in pushing legal reforms in Korea.²¹

3. Korea Copyright Act of 1957

Copyright was recognized as a right in 1948 when the Constitution of the First Republic of Korea was proclaimed.²² The

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. SONG, *supra* note 14, at 182–83.

21. See EDWARD J. BAKER, THE ROLE OF LEGAL REFORMS IN THE JAPANESE ANNEXATION AND RULES OF KOREA, 1905–1919, *cited in* SANG-HYUN SONG, KOREAN LAW IN THE GLOBAL ECONOMY 76, 98 (1996).

22. “All citizens shall have freedom of science and art. Rights of authors, inventors, and artists shall be protected by it.” HONBOP [CONSTITUTION] art.

Constitution of 1948 did not use the word "copyright" but provided the basis for it.²³ However, under Ordinance No. 21 of the U.S. Army Military Government (1945-1948) in Korea, the Copyright Act of Japan continued to be used by the Korean government until 1957. This is especially noteworthy since the 1908 U.S. copyright treaty with Japan for reciprocal protection in Korea of copyright and trademarks as well as designs and inventions became obsolete after World War II.²⁴ The first Korean copyright statute was established in 1957, modeled after the 1899 Copyright Act of Japan.²⁵

The Copyright Act of 1957 ("the Act") was formulated to promote the Korean culture by "protecting the authors of academic or artistic works."²⁶ The works to be protected under the Act included written and oral works, paintings, sculpture, fine art, architecture, maps, schematic drawings, photographs, musical works, drama, phonographs, cinema and things which belong to the academic and artistic categories.²⁷ The statute did not apply to: (1) Laws, regulations, decisions and orders of government agencies, and the texts of official documents, except for those "confidential" documents for internal use; (2) News of current events; (3) Miscellaneous information published in newspapers or magazines; (4) Public testimonies during the open

14 (1948), *translated in* 2 *Constitutions of Nations* 549-59 (Amos J. Peaslee ed., 2d ed. 1956).

23. *Id.*

24. Charles I. Bevans, 9 *Treaties and Other International Agreements of the United States of America 1776-1949*, at 408 (1972). *See* *Treaties in Force* 483 n.19 (1997).

Copyright convention with Japan for reciprocal protection in Korea of inventions, designs, trademarks, and copyrights, signed at Washington, May 19, 1908 (TS 506). This convention is considered as having been abrogated on April 8, 1951 (TIAS 2490), since it was not included in the notification which was given on behalf of the United States Government to the Japanese Government on April 22, 1953, indicating the prewar bilateral treaties or conventions which the United States wished to continue in force or revive.

Id.

25. CHOJAKKWONBOP [COPYRIGHT ACT], Law No. 432 art. 1 (1957), *translated in* *Laws of the Republic of Korea* 806, 806-13 (3d ed. 1975) [hereinafter *Copyright Act of 1957*].

26. Copyright Act of 1957, art. 2.

27. *Id.*

court proceedings; or (5) the open sessions of the National Assembly or the provincial legislatures.²⁸

Copyright included the personal and property rights of the author to his works.²⁹ That is, regardless of his property right to the work, the author “shall have the right to attribution”; to indicate his identity even after the monetary value to the work was transferred to others.³⁰ Further, Article 16 stipulated: “The author shall have the right to raise objections to those who injure his reputation by changing the contents and title of his work even after the property right to the work was transferred, irrespective of the property right to his work.”³¹

The Act did not require registration of the copyrighted work with the government under the self-operating recognition of the copyrighted work. Copyrights lasted for thirty years in addition to the life of the author.³² The copyright of translated material was protected for five years.³³ Except when it was first published in Korea, foreigners’ work was not protected under the statute unless otherwise stipulated.³⁴

The “fair use” concept was recognized to allow use of copyrighted material without violation of the law. The Act specifically allowed: (1) Copying a copyrighted work without using mechanical or chemical means and with no intention of publication; (2) Appropriately quoting from a copyrighted work; (3) Appropriately quoting illustrations in textbooks; (4) Using phrases from scholarly or artistic works as insert into a play or as supplement to a musical work; (5) Inserting scholarly or artistic works as explanatory material for other works; (6) Making drawings of sculptural work and vice versa; (7) Performing dramatic or musical works in public for educational purposes, and broadcasting of the performance; and (8) Using phonorecords, taped cassettes, and films for public performance or broadcasting.³⁵

28. *Id.* art. 3.

29. *Id.* art. 7.

30. *Id.* art. 14.

31. *Id.* art. 16.

32. Copyright Act of 1957, 30(1).

33. *Id.* art. 34(1).

34. *Id.* art. 46.

35. *Id.* art. 64(1).

4. 1986 Amendment to the Korea Copyright Act

The Act, amended in 1986,³⁶ protects the right of authors to ensure the improvement and development of culture in Korea. Compared with the previous Act, the Copyright Act of 1986 extends protection of the copyrighted work from thirty years to fifty years past the death of the author, and the copyright on a work created by two or more authors extends through the life of the last surviving author plus another fifty years.³⁷ Work created under employment is distinguished from "work-for-hire." If a person prepares a work within the scope of his employment, the copyright belongs to the employer, not the creator of the work.³⁸ However, copyright of work made by an independent contractor belongs to the contractor unless otherwise specified in the contract.³⁹ The Korean law recognizes foreigners' copyright to works under treaties that Korea has signed with foreign countries.⁴⁰ However, the treaty is not essential to the copyright protection of foreigners' works. Korean law still considers the residency status of foreigners and the initial publication of the foreigners' works in Korea.⁴¹ Even when a foreigner's work would be protected, if the foreign country concerned does not protect works of the nationals of the Republic of Korea, the protection under treaties and this Act may be restricted correspondingly.⁴²

36. See UNESCO, *Republic of Korea: Copyright Act 1986*, available at <http://www.unesco.org/culture/copy/copyright/republicofkorea/sommaire.html>.

37. *Id.* art. 36.

38. *Id.* art. 9. Article 9 reads:

[T]he author of a work which is prepared on duty by a person working or a juristic person under the direction of a corporation, organization, or other employer . . . and which is published in the name of the juristic person, . . . shall be the juristic person, . . . unless otherwise provided by employment or independent agreement.

39. *Id.*

40. *Id.* art. 3 (1).

41. Article 3 (2) provides:

[W]orks of a foreigner who has his habitual residence in the Republic of Korea (including foreign juristic persons having the principal office in the Republic of Korea . . .) and foreigners' works which are first published in the Republic of Korea (including works published in the Republic of Korea within 30 days after publication in a foreign country) shall be protected under this Act.

42. *Id.* art. 3 (3)

A broad categorization of works are protected by the Copyright Act of 1986. Among those listed in the statute are: (1) linguistic and literary works; (2) musical works; (3) theatrical works; (4) art works; (5) pictorial works; (6) motion pictures; and (7) computer program works.⁴³ The list is distinguished from that of the 1957 Act in that the kinds of work protected under the amended Act cover the entire scope of intellectual and cultural activity including computer program works. Similar to the U.S. law,⁴⁴ the Copyright Act of 1986 reestablished the "fair use" of copyrighted work as a limitation to the copyright of the owner. Unlike the Copyright Act of 1957, the amended Copyright Act of 1986 emphasized, by listing in detail, each category of Article 64 in the Copyright Act of 1957 under each Article in the amended Copyright Act of 1986. For example, Article 22 states that if it is necessary for the judicial proceedings or for internal material or legislative or administrative purposes, any work may be reproduced for such purposes unless it infringes unreasonably on the interest of the author's property right owned in light of the nature of the work and the number of copies and forms of the reproduction.⁴⁵ Further, Article 23 allows the released works to be inserted in textbooks to the degree necessary for educational purposes at schools of the level lower than high schools or the equivalent thereto.⁴⁶ In case of reporting current news through broadcasting, motion pictures, newspapers, or other means, any work which is viewed or listened to in the course of such reporting may be reproduced, distributed, performed publicly, or broadcast within the limits proper for such purposes.⁴⁷ The Copyright Act does not apply to quotations from released works "within the reasonable limit in conformity with fair practice."⁴⁸ The fair use exemptions to copyright, however, do not affect the author's personal right to reputation or privacy.⁴⁹ Finally, most notable accomplishment of the Copyright Act 1986 is establishment of *The Copyright*

43. *Id.* art. 4.

44. For the U.S. Supreme Court's interpretation of the "fair use" doctrine in American copyright law, see *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

45. Copyright Act of 1986, *supra* note 36, art. 22.

46. *Id.* art. 23(1).

47. *Id.* art. 24.

48. *Id.* art. 25.

49. *Id.* art. 35.

Deliberation and Conciliation Committee ("CDCC"), which mediates copyright disputes involving compensation, rates, and fees of copyright agents.⁵⁰

5. 1997 Amendment to the Korea Copyright Act

The Korea Copyright Act was amended again in 1997.⁵¹ Like its predecessor, the current Act protects an author's "moral rights" as part of his personal rights to his work. The moral rights, which the Berne Convention⁵² recognizes, focus on the author's right to claim "paternity" and to protect the "integrity" of his work. The "paternity" element of the "moral rights" is "the author's right to be made known to the public as the creator of his work, to prevent others from usurping his work by naming another person as the author, and to prevent others from wrongfully attributing to him a work he has not written."⁵³ Moral rights are not limited to the author's interest in protecting the "paternity" and "integrity" of a work. They sometimes "encompass the right to publish or not to publish a work, to withdraw a work from sale, and to prevent other injuries to the author's personality as embodied in the work."⁵⁴

The statute provides for the author's right to decide on publication of his work and for his right to identify his authorship by his real name or pseudonym on the original or reproductions of his work. The integrity of the author's work is also included in

50. *Id.* art. 82. See also CECE website at http://www.copyright.or.kr:8080/introduce/int_b_history.htm.

51. 1997 Copyright Act of Korea, Act No. 5453, Dec. 13, 1997, available at <http://www.copyright.co.kr> [hereinafter Copyright Act of 1997].

52. The Berne Convention, last revised in Paris in 1971, provides for the author's "moral rights" as follows:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, art. 6bis(1). For a discussion of the "moral rights" under the Berne Convention, see S.M. STEWART, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS* §§ 4.39–4.45 (2d ed. 1989).

53. RALPH S. BROWN & ROBERT C. DENICOLA, *CASES ON COPYRIGHT, UNFAIR COMPETITION, AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL, AND ARTISTIC WORKS* 717 (7th ed. 1998).

54. *Id.* at 708–709

the statute.⁵⁵ The author's moral rights belong exclusively to the author himself and do not abate with the death of the author.⁵⁶ The most remarkable amendment in the Copyright Act during 1990s is the strengthening of the penal provision for infringement of the copyright. Compared with its counterpart in the Copyright Act of 1987, Article 98 of the Copyright Act of 1997 increased the maximum amount of the criminal penalty for infringement of copyright from three years' imprisonment and 3 million won (USD 2,500)⁵⁷ to three years imprisonment and 30 million won (USD 25,000).⁵⁸ In addition, the maximum penalty for illegal publication is also increased from one year's imprisonment and 1 million won (USD 800) to one year's imprisonment and 10 million won (USD 8,000).⁵⁹

6. 2000 Amendment to the Korean Copyright Act

Most recently, the Korean Copyright Act was amended in 2000. This resulted in certain improvements of copyright protection and related procedures. First, the amendment's provision concerning registration of copyright has been significantly improved in terms of providing procedures needed for registration of copyright. Unlike the 1997 amendment which only provided vague procedures for registration of copyright, the 2000 amendment provides detailed, coherent and systematic steps in

55. Article 13 states:

(1) The author shall have the right to maintain the identity of contents, form, and title of his work; (2) The author shall not make an objection to a modification falling under any of the following subparagraphs unless essential contents are changed: 1. In the case of a work being used under Article 23 [use for purpose of school education], a modification of expression within limits as deemed inevitable for the purpose of school education; 2. Expansion, remodelling, and other forms of transformation of a building; and 3. Other modifications within limits as deemed inevitable in view of the nature of a work or the object or form of its use

56. Copyright Act of 1986, *supra* note 36, art. 14 (1).

57. Korean currency is the *won*: one U.S. dollar is approximately equal to 1,200 won.

58. Compare Copyright Act of 1986, art. 98, with Copyright Act of 1997, art. 98.

59. Compare Copyright Act of 1986, art. 99, with Copyright Act of 1997, art. 99.

registering copyright.⁶⁰ Second, the 2000 amendment strengthened the Act's penal provisions, increasing the maximum penalty for infringement of authors' "property rights" from three years' imprisonment and 30 million won (USD25,000) to five years' imprisonment and 50 million won (USD40,000).⁶¹ Finally, the 2000 amendment provides for a right of electronic transmission in accordance with the WIPO Copyright Treaty as well as "reproduction compensation system" to ensure payment of remuneration by copier machine makers and users."⁶²

C. Recent Progress in Judicial Review in Korean Copyright Cases

1. Korean Supreme Court Case

In the course of interpreting the Copyright Act for the past ten years, Korean courts have set the conceptual and legal framework of copyright as a right in Korea. The Supreme Court of Korea ruled on the "originality" of works as a requirement for protection of the works under copyright law. The Supreme Court stated:

To be eligible for protection under the Copyright Act, a work must be original with respect to literature, science, or arts (Article 2(1) of the Copyright Act) and creativity is required as an element of its copyright protection. But creativity referred to here does not mean originality in its perfect sense. Rather, it means only that the work is not a mere imitation of someone else's work and that it contains the expression of the author's individual ideas and feelings. To meet this requirement, it is sufficient that the work has the unique characteristic of the author's mental efforts and is distinguishable from the existing works of others.⁶³

60. 2000 Korean Copyright Act, Act No. 6134, Jan. 12, 2000, arts. 51–53, found in Statutes of the Republic of Korea, Vol. 7 [hereinafter Copyright Act of 2000].

61. *Id.* art. 97-5

62. See Copyright Act of 2000, arts. 18–2 & 27. See also Jay (Young-June) Yang, Hye-Suk Wee and Jae H. Kim, Kim & Chang, Seoul, Korea, *Recent Developments in IP Law in Korea*, available at, <http://www.asialaw.com/directories/ipprofiles/2000/korea>.

63. *Chong Dae-yong v. State*, 94 to 2243, Taebopwon [Supreme Court] (Nov. 14, 1995), Panrae kongbo [Official Gazette of Court Decisions] 117–19 (Jan. 1, 1996).

The Korean Supreme Court's notion of "originality" as the *sine qua non* of copyright protection is similar to the U.S. Supreme Court's standard for the creativity of copyrighted works under American law. The U.S. Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*⁶⁴ held: "Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works) and that it possesses at least some minimal degree of creativity . . . To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice."⁶⁵

Similar to U.S. copyright law,⁶⁶ the Korean law follows the principle that expressions are copyrightable, while ideas are not. The Supreme Court of Korea held:

A work under the Copyright Act must be a creative expression of the author's thinking and feelings acquired through an individual's efforts. Accordingly, what is protected by the Act is the author's creative means of expressing his thinking and feelings to the public by way of speech, language, sounds, or color. Although the contents or ideas expressed . . . may be creative and novel in their own way, they . . . cannot be copyrightable work and thus cannot be entitled to protection as part of the author's personal or property rights.⁶⁷

After all, what is protected by the Copyright Act is not the author's ideas but their expressions and it is limited to the individual aspect of the author's originality. Accordingly, a determination of whether a copyright was violated must be based on the rule that a substantial similarity between the two works at issue should concern their original expressions.⁶⁸

The idea-expression distinction explains why copyright law does not condition its protection of a work on its contents. The

64. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

65. *Id.* at 345 (citation omitted).

66. See *Baker v. Seldon*, 101 U.S. 99 (1879) (making a distinction between protected expressions and unprotected ideas under copyright law).

67. *Kim Song-gi v. Sin Sa-hun*, 93 Ta 3073, 3080, Taebopwon [Supreme Court] (June 8, 1993), 41(2) Taebopwon panraejip [Supreme Court Decisions] 103 (1993) (emphasis added). For a discussion of *Kim Song-gi v. Sin Sa-hun*, see Sim Chang-sop, Copyright Owner in the Case of Producing Application Art Work by Order, 19(2) Taebopwon panrae haesol [Commentaries on Supreme Court Decisions] 390-408 (1993).

68. See *Kim Song-gi*, *supra* 67, at 105.

Supreme Court of Korea has upheld copyright even where the work's content is considered "immoral" or "illegal."⁶⁹ This parallels the statutory and judicial approach to the copyright and morality issues in the U.S. An American legal scholar noted: "The 1976 Copyright Act nowhere bars protection because of the perceived illegality or immorality of a work's content. Contemporary courts have generally declined to imply any such bar into the Act, and have sustained copyright against charges that a work's obscene . . . content precluded relief for infringement."⁷⁰

2. *Educational Testing Service v. Seiyang Planning Inc.*⁷¹

Of a notable importance is a copyright case adjudicated by the Seoul District Court involving the Educational Testing Service ("ETS"), the American company in charge of supervising the *Test of English as a Foreign Language* ("TOEFL") in about 170 countries. ETS sued in Seoul Civil District Court, seeking damages against a Korean company for copyright infringement.⁷² This case originated from ETS's claim that the defendant company published a book using TOEFL test questions.⁷³

The defendants argued, relying on the "quotation from released works" clause of the Copyright Act, that their act of quoting the questions of the "released" TOEFL for its TOEFL review book did not infringe on the ETS copyright. They maintained that they could quote the tests for educational purposes within the reasonable limits in compliance with the fair practice of quoting under the law.⁷⁴

The Seoul Civil District Court rejected the defendants' argument based on "released works" under the Copyright Act. The court defined the "release" of a work as "presenting" the work "to the general public through public performance, broadcast-

69. See *Yi Chong-suk v. Yi Chae-gil*, 90 Taka 8845, Taebopwon [Supreme Court] (Oct. 23, 1990), 38(3) Taebopwon panraejip [Supreme Court Decisions] 7-20 (1990).

70. PAUL GOLDSTEIN, 1 Copyright, § 2.5.1, at 2:40-2:41 (2d ed. 1997) (citations omitted).

71. 92 Kahap 35610, Seoul Minsa Chibang Popwon [Seoul Civil District Court] (Oct. 15, 1993), 3 Hagupsim pangyoljip [Lower Court Decisions] 243 (1993) [hereinafter ETS].

72. *Id.*

73. *Id.*

74. *Id.* at 248-49.

ing, display, or by any other means, and to publish [its] work.”⁷⁵ The mere fact that the TOEFL tests were given to a limited number of students could not constitute the “release” of the tests under the law. The court emphasized ETS’s policy of disallowing students from keeping or circulating the tests and of retrieving the copies of the tests after the tests.⁷⁶

The Seoul Civil District Court ruled that ETS should recover the damages equivalent to the amount of profits that ETS would ordinarily make from its rights to the TOEFL questions, whether they were published or not.⁷⁷ The Court awarded ETS USD39,400 in damages against the Korean defendants for their violation of the ETS copyright to the TOEFL questions. Noting that each published TOEFL question would be worth USD 10 in profits to ETS, the court calculated the damages based on the possible profits that ETS might have earned from the total of 3,940 TOEFL questions that the Korean defendants published illegally.⁷⁸

Nevertheless, the Seoul court rejected the ETS’s USD47,891 damages claim for its alleged expenditure in creating new questions for a make-up test which was required for those who took the previous tests with the same questions that the defendants had published. The court argued that the defendants did not expect ETS to use the questions they had copied for publication in its actual TOEFL, let alone the “special damage” that ETS would suffer in arranging for the retaking of the tests with new questions.⁷⁹ ETS did not include in its damages claim the possible profits of the Korean defendants that were attributable to their infringement of its TOEFL copyright.

III. SOURCES OF EXTERNAL INFLUENCES ON KOREAN COPYRIGHT LAW

A. Impact of U.S. Law and Executive Actions on Korean Copyright Law

While increase in global economic activities and demand for domestic industry protection have created a conducive envi-

75. *Id.* at 249.

76. *Id.*

77. *Id.* at 251.

78. *Id.*

79. *Id.*

ronment for copyright protection in Korea, U.S. law and their executive actions have had a substantial impact on recent development in Korean copyright law. Section 301 of the Trade Act of 1974, in particular, had the initial impact.⁸⁰

Section 301 confers upon the President broad discretionary power to impose retaliatory actions against foreign governments when he finds that their "act, policy, or practice" is (1) "inconsistent with . . . or otherwise denies benefits to the United States under any trade agreement," or (2) "unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce."⁸¹ Section 301 is unusual in that it not only provides the President authority to enforce powerful executive actions,⁸² but also allows "[a]ny interested individuals" to peti-

80. See Trade Act of 1974, §§ 301–06 (codified at 19 U.S.C. §§ 2411–2416), as amended, Pub.L. No. 96–39, tit. IX, 93 Stat. 295 (1979); Pub.L. No. 98–573, §§ 304, 306, 98 Stat. 3002 (1984); Pub.L. No. 100–418, §§ 1301–02.

81. 19 U.S.C. § 2411(a) provides:

If the President determines that action by the United States is appropriate --

(1) to enforce the rights of the United States under any trade agreement; or

(2) to respond to any act, policy, or practice of a foreign country or instrumentality that --

(A) is inconsistent with the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or

(B) is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce;

the President shall take all appropriate and feasible action within his power to enforce such rights or to obtain the elimination of such act, policy, or practice. Action under this section may be taken on a non-discriminatory basis or solely against the products or services of the foreign country or instrumentality involved.

82. 19 U.S.C. § 2411(b) authorizes the President to:

(1) suspend, withdraw, or prevent the application of, or refrain from proclaiming, benefits of trade agreement concessions to carry out a trade agreement with the foreign country or instrumentality involved; and

(2) impose duties or other import restrictions on the products of, and fees or restrictions on the services of, such foreign country or instrumentality for such time as he determines appropriate.

Section 301 also reaches farther than other United States trade laws: (1) Section 301 can be used against foreign government practices that harm U.S.

tion the government to enforce executive actions against foreign governments on their behalf.⁸³ During the 1980s, the U.S. had effectively utilized Section 301 to pressure developing countries to strengthen their intellectual property law.⁸⁴

In November 1985, the U.S. initiated a Section 301 investigation into the potential adverse impact on the U.S. intellectual property rights as a result of inadequate copyright protection by the South Korean government.⁸⁵ Initially, a complaint by U.S. chemical companies having interest in patent protection in Korea triggered the investigation.⁸⁶ However, the investigation later encompassed copyright protection issues. For example, the United States Trade Representative ("USTR") commented that Korea's copy right protection is "virtually non-existent."⁸⁷ Although the U.S. officials had expected that the initial draft of the Korean Copyright Act of 1986 would provide effective protection of copyrights, especially with regard to computer programs, the draft failed to meet such expectation.⁸⁸ U.S. intellectual property owners continued to experience unauthorized reproduction of copyrighted materials in Korea, and the South Korean government's failure to protect the American interest

exporters in third country markets; (2) Section 301 deals with a greater array of trade-distorting commercial policies, including those affecting services and investment; (3) Section 301's requirement that foreign government practices "burden[] or restrict[]" United States commerce is much lower than the "material injury" requirement of other United States trade laws; and (4) Section 301 gives the President a broader choice of remedies than other trade laws.

83. 19 U.S.C. § 2412(a) (1982 & Supp. III 1985) provides that:

Any interested person may file a petition with the United States Trade Representative ("USTR") . . . requesting the President to take action under section 2411 of this title and setting forth the allegations in support of the request. The Trade Representative shall review the allegations in the petition and, not later than 45 days after the date on which he received the petition, shall determine whether to initiate an investigation.

84. See generally David I. Wilson, *A Trade Policy Goal for the 1990s: Improving the Adequacy and Effectiveness of Intellectual Property Protection in Foreign Countries*, 1 TRANSNAT'L LAW. 421 (1988).

85. See *id.* at 427.

86. See *id.*

87. See *id.*

88. See *id.*

prompted the USTR to pressure South Korean government and industry with the threat of retaliation.⁸⁹

This Section 301 mechanism activated extensive consultations with the South Korean government, consummating in a settlement agreement in August of 1986.⁹⁰ As a result, South Korea agreed to introduce a general copyright bill by July 1, 1987, in which the scope of copyright protection would conform with the standards enumerated in the Universal Copyright Convention ("UCC"),⁹¹ and to enact the Computer Program Protection Law explicitly covering computer software.⁹² In addition, Korea agreed to accede to the UCC and Geneva Phonograms Convention by October 1987.⁹³ Accordingly, the 301 action had a direct impact on the passage of the 1986 Korean Copyright Act.

Furthermore, through the mechanism of "Special 301," which the U.S. Congress created when it passed the Omnibus Trade and Competitive Act of 1988, the United States Trade Representative ("USTR") identifies those countries that deny adequate and effective protection of intellectual property rights, and, through annual reports, recommends that these countries be subject to immediate trade sanctions.⁹⁴ South Korea is one of

89. GENERAL ACCOUNTING OFFICE, *Strengthening Worldwide Protection of Intellectual Property Rights*, GAO/NSI AD-87-65 (1987) [hereinafter GAO Report].

90. 51 Fed. Reg. 29, 445 (1986).

91. Universal Copyright Convention, Sept. 6, 1952, Geneva, 6 U.S.T. 2731, T.I.A.S. No. 3324, 216 U.N.T.S. 132, revised July 24, 1971, Paris, 25 U.S.T. 1341, T.I.A.S. No. 7868; Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication, Oct. 29, 1971, 26 U.S.T. 309, T.I.A.S. 7808.

92. Press Release, Korean Information Office, Embassy of the Republic of South Korea, Section 301 Cases Finally Settled - Insurance and Intellectual Property Rights, at 6 (July 21, 1986). Under the old Copyright Act of 1957, computer program works were omitted from the list of subject matter for protection. However, the Copyright Act of 1986 protects virtually the entire scope of intellectual and cultural activity. See Copyright Act of 1986, *supra* note 36, art. 4(1).

93. Wilson, *supra* note 84, at 428.

94. See Special 301, International Intellectual Property Alliance, available at http://www.iipa.com/copyrighttrade_issues.html.

Countries which have the most onerous or egregious acts, policies or practices and which have the greatest adverse impact on relevant U.S. products must be designated "Priority Foreign Countries," and at the end of an ensuing investigation, risk having trade sanctions

the countries whose status of intellectual property protection the USTR watches and inspects annually.

The resulting impact is illustrated in the Act. The Act provides copyright protection for a term of life plus fifty years for works authored by individuals and for a term of fifty years for works authored by juridical persons.⁹⁵ It also protects sound recordings made outside of South Korea for a term of twenty years and stringently enforces existing protection of sound recordings against unauthorized reproduction, importation and distribution.⁹⁶ The extension of protection to foreign sound recordings and the enactment of the Computer Program Protection Law was to inhibit sound-recording and software piracy by Korean manufacturers.⁹⁷ At the time of the post-301 action negotiations, South Korea also pledged to ensure adequate protection of intellectual property rights through strict enforcement of the relevant laws and through public announcements of the administrative rules and regulations affecting the protection of intellectual property rights.⁹⁸ However, as discussed below, whether this promise is being enforced is open for debate, and should be further examined.

B. Impact of International Copyright Conventions on Korean Copyright Law

Since the 1986 bilateral agreement between the U.S. and Korea, the U.S.'s impact on the Korean Copyright Act through Section 301 actions has resulted in Korea's accession to multilateral Copyright Conventions⁹⁹ and may also cause Korea to

levied against them. Countries can also be placed on other lists which do not result in immediate trade sanctions, such as "Priority Watch List" and "Watch List." Special 301 is an annual review process which starts when public comments due to USTR in mid-February, with USTR announcing its decisions on April 30.

Id.

95. *See supra* note 37.

96. *Id.*

97. *See supra* note 92, at 2–3.

98. *Id.* at 8.

99. Korea is a signatory to the World Intellectual Property Organization ("WIPO"), the Universal Copyright Convention ("UCC") and the Paris Convention for the Protection of Industrial Property. *See* Going Global : Korea Export Issues, 1997 Export Hot line, available at <http://home3.american-express.com/smallbusiness/resources/expanding/glob/11139020.shtm>.

become signatory to other similar Conventions. Korea's accession to the international treaties has great significance in that Korea began to recognize the importance of copyright in accordance with the international norm.

1. Berne Convention

The Berne Convention is the world's oldest international copyright convention and provides the highest level of multilateral copyright protection.¹⁰⁰ Although South Korea has not acceded to the Berne Convention, it had an indirect influence on the Korean Copyright Act of 1986 and its 1997 amendments. For example, as discussed *supra* Part II, the concept of moral rights has been incorporated into the Act's provisions, which the Berne Convention recognizes.¹⁰¹

A major point of debate between South Korea and the U.S. about the Copyright Act of Korea is retroactive copyright protection, which is based on Article 18 of the Berne Convention. While the U.S. asserts retroactive protection dating back to 1950, as would now be required under the Berne Convention, the Korean government insists on retroactive protection only back to 1957 for national and foreign works.¹⁰² Some argue that "Korea's accession to the Berne Convention has become inevitable."¹⁰³

2. Universal Copyright Convention ("UCC")

As part of the bilateral negotiation with the U.S., in 1987, South Korea joined the UCC (effective Oct. 1, 1987) and the Geneva Phonographs Convention (effective Oct. 10, 1987).¹⁰⁴ While the UCC does provide fairly comprehensive copyright protection provisions, as one commentator noted, there is a

100. John T Masterson, Jr., *Protection of Intellectual Property Rights in International Transactions*, Corporate Law and Practice Course Handbook Series, 863 Practising Law Inst. 333, 360 (Oct. 1994).

101. See *supra* notes 51–54 (discussing moral rights in the Korean Copyright Act and Berne Convention).

102. See International Intellectual Property Alliance, *2001 Special 301 report : South Korea* 222, available at http://www.iipa.com/special301_TOCs/2001_SPEC301_TOC.html [hereinafter IIPA 2001 Report].

103. See Song & Kim, *supra* note 10, at 130.

104. Joon K. Park, *South Korea*, in *INTELLECTUAL PROPERTY LAWS OF EAST ASIA* 337, 348–49 (Alan S. Gutterman & Robert Brown eds., 1997).

wrinkle between Korea's accession to the UCC and its future accession to the Berne Convention:

Because the UCC does not protect works pre-existing on the date of its enforcement in a specific jurisdiction, Korea's primary concern with acceding to the Berne Convention is the interpretation of Article 18, which prescribes protection of works existing at the moment the Berne Convention comes into force. The decision of whether the protection of existing works will be retroactive or not will greatly affect the copyright protection of works by foreign authors in Korea. In addition, rental rights for copyrighted works will have to be carefully reviewed. Although rental rights are required under Article 11 of TRIPs, existing laws do not provide rental rights for computer programs and cinematographic works.¹⁰⁵

Therefore, one of the central issues of concern for the USTR is whether South Korea would implement a retroactive application provision of the Berne Convention into its Copyright Act in case South Korea does become a signatory to the Berne Convention.

IV. PROBLEMS IN ENFORCEMENT OF COPYRIGHT LAW IN KOREA AND SUGGESTED SOLUTION

A. Current Problems of Copyright Protection in Korea

Korea has made a modest effort to strengthen copyright protection by passing the Copyright Act and Computer Program Protection Act ("CPPA"), which were designed to comply with its obligations under WTO's TRIPs Agreement.¹⁰⁶ Nonetheless, copyright violations have been recurring in Korea and, as a result, Korea has been placed on the Priority Watch List for many years.¹⁰⁷ According to the International Intellectual Property

105. See Song & Kim, *supra* note 10, at 130.

106. USTR, 1996 National Trade Estimate — Republic of Korea, *available at* <http://www.ustr.gov/reports/nte/1996/korea.html>.

107. According to the Chart of Countries' Special 301 Placement and IIPA 2001 Special 301 Recommendation, Korea has been in the list of Priority Watch List except those years when the U.S. government pushed Korean government to implement the stronger enforcement for intellectual property protection. See International Intellectual Property Alliance, *2001 Special 301 report: Appendix D*, *available at* http://www.iipa.com/pdf/2001_special301AppendixD.pdf [hereinafter IIPA 2001 Report, App. D]. In Spring 2000, for example, Korea was elevated to Special 301 "priority watch list" from "watch

Alliance ("IIPA"), Korea's copyright law amendments did nothing to eliminate a clear and long-standing discrepancy between Korean law and the requirements of TRIPs Agreement.¹⁰⁸ For example, under the Article 18 of Berne Convention and the Article of 14.6 of the TRIPs Agreement, existing works and sound recordings not previously protected in a WTO member country must be protected retroactively for the full term of protection (fifty years, or life plus fifty years) even if the work or sound recording has not fallen into the public domain in the country of origin through the expiration of the term of protection.¹⁰⁹ However, Korea's transition rules do not protect foreign works whose authors died before 1957 and, thus, fail to comply with the TRIPs Agreement.¹¹⁰ Under the transitional rules, producers of pre-1995 derivative works of newly protected foreign works were allowed to reproduce and sell those works until the end of 1999, without paying any compensation to the copyright holder.¹¹¹ Such reproduction practices are incompatible with the transition rules under the Article 18(3) of the Berne Convention and, thus, would permit continued exploitation of the copyright holder.¹¹²

In addition, there are also continuing concerns over the legislation, including the issue of reproduction in libraries.¹¹³ The IIPA highlights the potential infringement of international copyrights related to production in libraries:

Article 28 (1) allows libraries and similar institutions to digitize entire works or sound recordings without permission, and to give copies to patrons who may remove them from the premises. Even worse, Article 28 (2) allows libraries and similar institutions to transmit the works they have digitized over networks, not only within their own premises, but also over interlibrary networks. Furthermore, a proviso in the 1999 draft amendments which forbade the use of such a transmitted copy

list," mostly due to Korea's lack of full retroactive protection for pre-existing copyrighted works and problematic amendments to Korea's Copyright Act and CPPA. See USTR, Foreign Trade Barriers: Republic of Korea Trade Summary in 2000, 276, 285, available at http://www.ustr.gov/html/2001_korea.pdf.

108. See IIPA 2001 Report, *supra* note 102.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. See USTR, *supra* note 106, at 286.

outside the library . . . was dropped in the final text as enacted. These extraordinary exceptions for unauthorized digitization and networked distribution by libraries apply without regard to whether digitized copies or licenses for networked distribution, are available in the legitimate commercial marketplace. . . . With the expansion of the exception to cover interlibrary digital networks, an intolerable impact is highly likely. Such a sweeping exception cannot satisfy the well established international standards governing exceptions or limitations on protection, contained in Berne Article 9(2) and TRIPs [Agreement] Article 13.¹¹⁴

The above-noted concern is reflected in the situation faced by American book publishers. For example, in 2000, as a result of book piracy in Korean market, the U.S. publishing industry incurred an estimated loss of USD39 million, a fifty-six percent increase from 1995.¹¹⁵ This loss represents the extent to which piracy practices are spread in small copy shops near college campuses, serving both professors and students alike.¹¹⁶ However, the new legislation does not explicitly prohibit such practice.

Moreover, there are problems with regard to enforcement procedures and deterrent penalties in compliance with the TRIPs Agreement, namely, that: (1) damages as a “deterrent to further infringements” an inadequate (TRIPs Agreement Article 41.1); (2) in practice, judicial authorities do not order prompt and effective provisional measures, including *ex parte* measures (TRIPs Agreement Article 50); (3) there is a lack of transparency in tracking criminal prosecutions (TRIPs Agreement Articles 41.3 and 61); (4) the law enforcement community is reluctant to apply criminal penalties for copyright piracy on a commercial scale by refusing to treat software piracy as a “public offense” (TRIPs Agreement Article 61).¹¹⁷

Finally, as noted *supra*, in response to the rapid rise in computer software piracy, Korea enacted the Computer Program Protection Act (“CPPA”) to extend copyright protection to computer software in 1989.¹¹⁸ Nonetheless, Korea has been criti-

114. See IIPA 2001 Report, *supra* note 102, at 221.

115. See USTR, *supra* note 106, at 286.

116. *Id.*

117. See IIPA 2001 Report, *supra* note 102, at 222, n 7.

118. See USTR, *supra* note 106.

cized for its deficient enforcement against end-user software piracy such as: (1) unfair treatment of certain types of software primarily produced by the U.S.; (2) lack of consultation with the computer industry concerning optimal targets for the inspections; and (3) sporadic enforcement of limited duration.¹¹⁹

The above illustrations confirm that, despite its efforts to strengthen copyright protection, Korea still suffers from international criticism on its lack of commitment to global copyright standards and vigorous enforcement against copyright infringement. However, without identifying and understanding the fundamental source of the above-noted problems, critique of Korean copyright law and enforcement would be counterproductive. Accordingly, the following section addresses the fundamental problems in enforcement of Korea's copyright law and suggested possible solutions.

B. Limits Arising from Differences in Legal System

1. Influence of Civil Law System in Korea: Limits in Damages

Korea's current legal system is modeled after civil law system of continental Europe which Korea adopted through Japan.¹²⁰ Accordingly, some have argued that "South Korea's civil law system lacks procedures characteristic of litigation practice in common law jurisdiction, such as discovery and the right to compel documents."¹²¹ Further, Koreans' traditional reluctance to claim damages for their copyright violations is identical to the higher value attached to the criminal rather than civil sanction for libel in Korean society. Media law scholar Paeng Won-sun observed: "First, it has been a prevailing opinion in Korean society that a man who has injured another's reputation should be subject to penal punishment as part of retributive justice. Second, it has not been a tradition in Korea that infringement on the good name of another person ought to be compensated for in terms of monetary damages."¹²²

119. See IIPA 2001 Report, *supra* note 102, at 212-214.

120. Kyu Ho Youm, *Copyright Law in the Republic of Korea*, 17 UCLA PAC. BASIN L.J. 276, 299 (2000).

121. William Enger, *Korean Copyright Reform*, 7 UCLA PAC. BASIN L.J. 199, 207 (1990) (citation omitted).

122. WON-SUN PAENG, MAESU KOMYUNIKESHYON POPCHEI IRON [A THEORY OF MASS COMMUNICATION LAW] 151 (rev. ed. 1988).

The Act indeed follows the continental model of emphasizing author's personal rights over their property rights, thus provides for damage awards and penal sanctions for violation of the author's moral right.¹²³ Article 95 of the Act provides that "[t]he author may demand a person who has infringed intentionally or negligently on his author's personal right to take measures necessary for the restoration of his reputation instead of or in addition to the compensation for damage."¹²⁴

Sanctions for acts of copyright infringement are stipulated in Article 91 which provides that "[a]ny person who has the copyright or any other right protected under this Act . . . may demand of a person infringing his rights to suspend such act or demand a person likely to infringe his rights to take preventive measures or to deposit securities for compensation for damages."¹²⁵ Damages are estimated by profits gained by the infringement plus the amount which the complainant could have earned in excess of the defendant's profits.¹²⁶ When it is difficult to calculate the number of illegal publications, the law presumes 5,000 unauthorized book reprints and 10,000 unauthorized phonograph records.¹²⁷ Therefore, an author whose rights have been violated may seek injunction to stop the on-going violation and/or claim monetary damages.

The Copyright Act allows authors seeking civil damages against the violators to initiate criminal sanctions against these violators.¹²⁸ "By filing a criminal complaint . . . right holders can push prosecutors to take actions such as a raid and seizure of the infringing products. If the raid is successful and the infringer is convicted, the right holder can bring a civil action for damages, using the criminal conviction as evidence."¹²⁹ Further, criminal penalties can be used by authors as a partial cure for the pitfalls of civil remedies under the Copyright Act. Specifically, the Copyright Act provides criminal penalties for

123. See ETS, *supra* note 71, at 299.

124. Copyright Act of 2000, *supra* note 60, art 95.

125. *Id.* art. 91.

126. *Id.* art. 93.

127. *Id.* art. 94.

128. See Song & Kim, *supra* note 10, at 134.

129. *Id.*

“crime of infringement” of copyright¹³⁰ and “illegal publication.”¹³¹

Criminal infringement of copyright includes: (1) infringement of the author's property rights protected by the Act by means of reproduction, public performance, broadcast, or public display; (2) infringement of moral rights that defames the dignity of the author; and (3) fraudulent copyright registration.¹³² The 2000 Amendment of the Korean Copyright Act strengthens the penal provision for infringement of the author's property right by separating it under Article 97-5 from the Article 98 of the 1997 Act and increasing the maximum penalty for infringement of authors' “property rights” to five years' imprisonment and 50 million won (USD 40,000).¹³³ Article 98 makes a violation of the author's moral right a crime punishable by imprisonment of up to three years or a fine of not more than 30 million won (USD 25,000).

Illegal publishing is defined as releasing: a work under a name or alias of a person other than that of the author; prejudicing the author's moral rights or defaming the dignity of a deceased author; operating a copyright agency business without obtaining a permit; knowingly importing goods that infringe on copyright or neighboring rights.¹³⁴ Article 99 makes acts of illegal publishing punishable by imprisonment of up to 1 year or a fine of not more than 10 million won (USD 8,000).¹³⁵

Nonetheless, unlike the U.S. criminal justice system, in which the prosecuting agency has the sole discretion in determining whether to prosecute certain defendants, regardless of the victims' wishes, the Korean legal system, with the exception of murder and other violent crimes, allows crime victims to initiate and drop charges against the violators.¹³⁶ This aspect of Korean legal system arguably undermines the deterrent effect of preventing the most serious copyright violators through criminal sanctions. In addition, compared with the penal provi-

130. Copyright Act of 2000, *supra* note 60, arts. 97-5, 98.

131. *Id.* art. 99.

132. *Id.* arts 97-5, 98.

133. Compare Copyright Act of 1997, *supra* note 51, art. 98 (1), with Copyright Act of 2000, *supra* note 60, art. 97-5.

134. Copyright Act of 2000, art. 99.

135. *Id.*

136. See Song & Kim, *supra* note 10, at 134.

sion of the copyright act of the U.S., which allows the copyright owner to receive the statutory fine up to USD150,000 from the violators,¹³⁷ the amount allowed under the 2000 amendment to the Korean Copyright Act is relatively minor.

2. Limited Enforcement Mechanisms

The main problem in Korea's copyright protection is the limited mechanisms for enforcing the Act. This problem mostly stems from cultural and educational limitations in the judiciary and government agencies that enforce the Act. For example, authors or owners of copyrights would have to make extraordinary efforts to enforce their rights against infringement in Korea because the Korean legal system requires direct complaints from copyright holders before the responsible governmental agencies can take any action against the alleged infringer.¹³⁸

Further, the concept of damages is relatively new to the Korean legal system. As one commentator has noted:

The amount of damages tends to be decided based on the profits earned by the infringer or the reasonable royalty, rather than the actual amount of loss to the right holder due to the infringement. Due to the lack of a pretrial discovery process, it is very difficult for the plaintiff to prove the infringer's profits. The courts, therefore, are inclined to rely on the reasonable royalty rather than the actual damages approach. The legal system of Korea is unfamiliar with the idea of treble damages or any kinds of punitive damages as a civil remedy. The lack of discovery, in combination with the lack of punitive damages, makes civil remedies an ineffective means of redressing an injury caused by infringement.¹³⁹

He further notes:

Providing effective civil remedies is not the only problem of intellectual property laws. It will require a review of the judicial system in Korea as a whole, including the court structure, legal education system, the process of selecting judges, and judicial administration to mention a few. The most significant

137. See 17 U.S.C. § 504.

138. See Suh, Eun Joo, *South Korea: Status of the Book Industry*, U.S. & Foreign Commercial Service and Dep't of State, available at, <http://www.tradeport.org/ts/countries/skorea/isa/isar0028.html>.

139. See Song & Kim, *supra* note 10, at 133.

impact of TRIPs Agreement on Korea is that it urges the country to re-evaluate its entire system.¹⁴⁰

The above suggestion is an ambitious one given the fact that the Korean legal community has been extremely reluctant to reform itself in the past.¹⁴¹ Nonetheless, Korean courts seem to be slowly adopting the common law-based litigation and rights-based approach of the Anglo-American jurisprudence.

C. Sociocultural Influence: Absence of Copyright as a "Rights-based" Concept

Arguably, the most significant limit in the enforcement of copyright protection is deeply rooted in Korea's socio-cultural value system, which does not recognize the rights-based concept of copyright. Under the Confucian political philosophy, which deeply influenced the Korean value system, education was guided by the government and printing of books was a job of the government.¹⁴² Reading books was not only a means of elevating social status by passing a national exam, but also an essential factor to become a "complete" human being.¹⁴³ While writers gained an honorable status through authorship, making money through writing books was not acceptable to an educated person.¹⁴⁴ Ideas or creative thoughts were considered to be in the public domain, not private property, and therefore copying a book written by others was not an offense, but instead a recommended activity, reflecting a passion for learning.¹⁴⁵

140. *Id.* at 134.

141. The Korean legal bar is notorious for maintaining status quo. For example, less than 2% of the total applicants for the Korean bar membership is admitted annually through extremely competitive examination process. Although younger generation of Korean lawyers has been advocating for increase of the bar membership, which became a pending bill in the Korean Assembly, this proposal was ultimately rejected. In addition, foreign attorneys are not allowed to practice in Korea. With the advent of global economy, however, it is possible that certain reforms may occur in Korea. For example, there is a bill pending in the Korean Assembly that would, though limited, allow foreign attorneys to practice in Korea. Japan recently passed a similar bill. See AsiaLaw Profile 2002: South Korea, available at <http://www.asialaw.com/directories/asialaw2002/southkorea/default.htm>.

142. See Song & Kim, *supra* note 10, at 120.

143. *Id.*

144. *Id.*

145. *Id.*

This long-standing traditional attitude toward intellectual property rights has not changed greatly, even after the enactment of intellectual property laws after World War II.¹⁴⁶ Accordingly, enacting Copyright Act is only the first step toward recognition of copyright. Without widespread understanding of the concept of copyright in society, enforcement of copyright cannot be accomplished merely by enacting a Copyright Act. The perception that intellectual property laws were enacted to meet the demands of foreigners, which is prevalent among average Koreans, only works against this requisite understanding of copyright.¹⁴⁷ Even law-enforcing institutions, including police, prosecutors and sometimes courts, are not free from such a negative attitude toward protection of copyright.¹⁴⁸

D. Suggested Solutions

Korea's Copyright Act has arguably developed as a result of two main factors, namely, Korea's economic necessity to protect its own intellectual property rights and external pressures from western countries. However, these factors are not mutually exclusive. Considering Korea's economic development and its status as the second biggest Internet market in all of Asia,¹⁴⁹ it is not unimaginable that developing countries may infringe the Korean copyright in the near future. Therefore, it is inevitable for the Korean government to recognize that protection of copyright serves Korea's long term interests in economy and trade. President Kim Dae Jung recently expressed this recognition by stating that success of Korea's domestic software industry directly depends on a strong regime for the protection of intellectual property rights.¹⁵⁰

It is certainly true that Korea has taken concrete steps to update its principal copyright law.¹⁵¹ However, in the light of the rapid technological development occurring at unprecedented

146. *Id.*

147. *Id.*

148. See Song & Kim, *supra* note 10, at 120.

149. See Int'l Communication Union, *Asia-Pacific Telecommunication Indicators 2002*, available at <http://www.itu.int/osg/spu/spuactivities/2002/APTI2002.pdf>.

150. See IIPA 2001 Report, *supra* note 107, at 287.

151. See IIPA, 2002 Special 301 Report; South Korea, 238 available at <http://www.iipa.com/rbc/2002/2002SPEC301KOREA.pdf>.

speeds, Korea needs to do more in modernizing its legal framework and reforming its enforcement practices to respond to the growing challenge of digital and online piracy.¹⁵² Specifically, Korea needs to provide incentives for online service providers to cooperate in combating piracy. It may also clarify the copyright owner's rights in this field. This can be accomplished by transparency of enforcement against institutional end-user pirates, cooperation with the private sector, a sustained government's effort, and effective public education.¹⁵³ Most of all, the suggestions should be based on perception of the public and the government that piracy in this field will be the greatest impediment to the development of the Korean software and to Korea's goal of becoming a worldwide software power.¹⁵⁴ Accordingly, the ultimate solution to the copyright problem in Korea must derive from a positive perception of copyright protection and willingness on the part of the Korean government and its people to support it.

Yet, because the above-noted limits are essentially inherent within Korea's own socio-cultural and legal system, the Korean government's effort to effect the enforcement may be limited. Furthermore, the socio-cultural reluctance to recognize a rights-based concept of copyright may also limit the role of American and other western legal and political communities. International community may fill these gaps by providing educational support to various Korean institutions.

In short, the Korean society needs an acculturation process in becoming familiar with the values of copyright and the effect of its infringement. For example, international industry and non-profit organizations should increase their activities with the Korean counterparts in educating the Korean public about various copyright issues. In addition, countries with advanced copyright enforcement systems such as the U.S. should collaborate with the Korean government to provide enforcement training to Korean law enforcement officials, attorneys, prosecutors and members of judiciary. Finally, given that media plays a significant role in elevating public consciousness about certain social issues, utilizing the Korean media should be the primary

152. *Id.*

153. *Id.*

154. *Id.* at 240.

medium in educating the Korean public about copyright protection and the effect of its infringement.

In essence, the suggested approach reflects preventive and educational rather than reactive approach. While certain retaliatory mechanisms such as Section 301 and Super 301 have been effective in the short-run, given potentially devastating effects of such mechanisms,¹⁵⁵ it is doubtful that these mechanisms would continue to prove to be effective in the long-run. As discussed in this Note, the root of the problem in copyright protection in Korea is a cultural and educational one. Therefore, the ultimate solution to the copyright problem in Korea lies in educating the Korean public and society about the importance of copyright protection.

V. CONCLUSION

Mere accession to the multilateral treaties is not enough to meet the global trend to recognize the importance of copyright protection. Copyright piracy in books, video, music and business software programs will not disappear based on international criticisms alone. While the Korean government should set up a comprehensive system that would effectively enforce copyright violations and educate the Korean public about the importance of copyright protection, the international community should continue to collaborate with the Korean government to achieve those tasks.

Yunjeong Choi

155. Given the recent anti-American sentiment in Korea, retaliatory trade actions by the U.S. would further inflame such sentiment. See Jee-yeon Seo, *Anti-American Rallies Could Jeopardize US Investment*, KOREA TIMES, Jan. 10, 2003, available at <http://times.hankooki.com/lpage/200301/kt2003011017383010160.htm>.